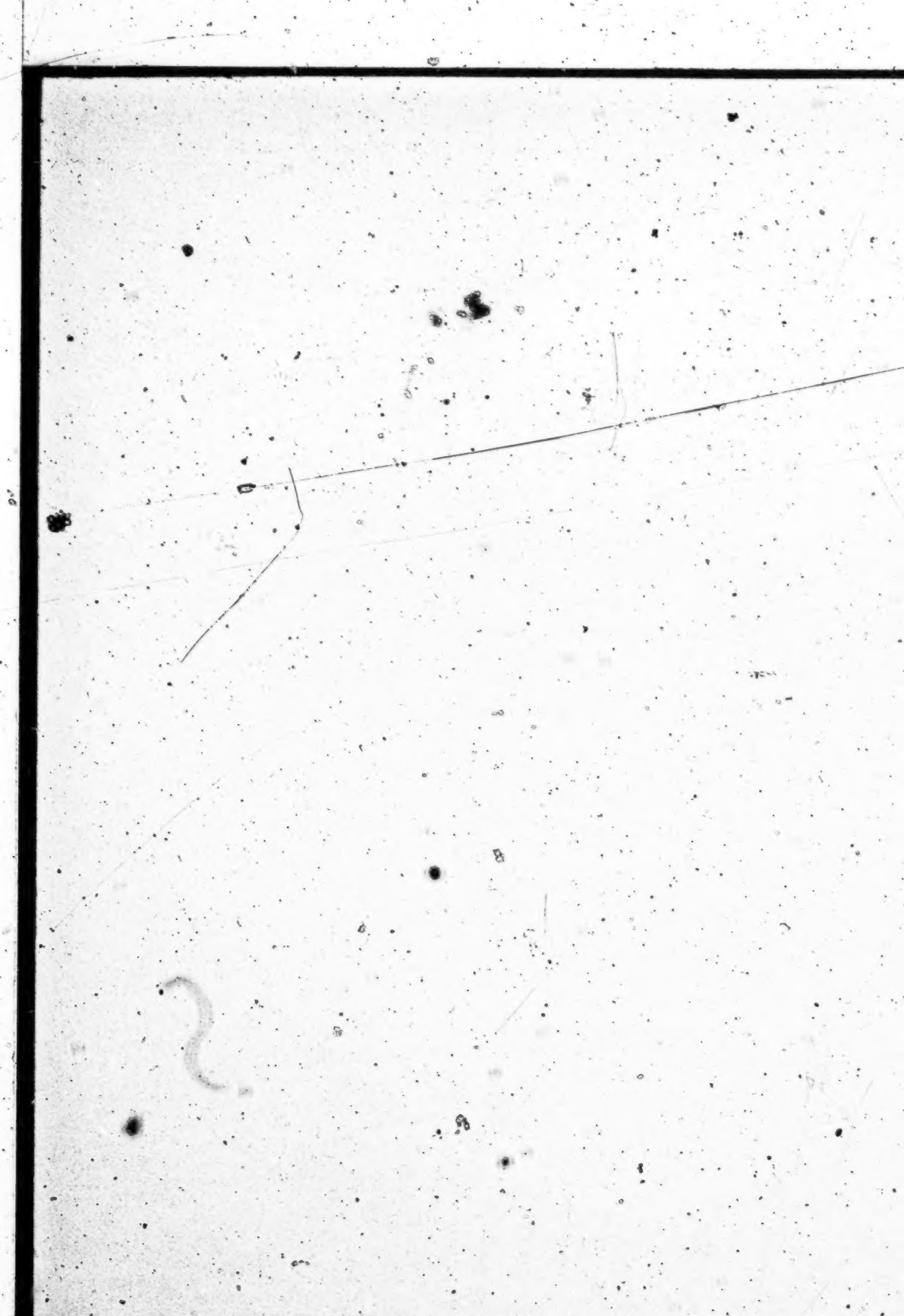

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No. 820

In the Supreme Court of the United States

OCTOBER TERM, 1967

THRIFTY SHOPPERS SCRIP CO., *Appellant*

v.

UNITED STATES OF AMERICA, BLUE CHIP STAMP COMPANY, ALEXANDER'S MARKETS, LUCKY STORES, INC., MARKET BASKET, PURITY STORES, INC., RALPHS GROCERY COMPANY, SAFEWAY STORES, INCORPORATED, THRIFTIMART, INC., THRIFTY DRUG STORES CO., INC., and VON'S GROCERY CO.

On Appeal from the United States District Court for the Central District of California

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Petition for Rehearing of Appellant Thrifty Shopper Scrip Co.

Appellant Thrifty Shoppers Scrip Co. ("Thrifty Shoppers") submits this petition for rehearing of the order of this Court, dated January 15, 1968, affirming the judgment of the district court. As grounds for this petition, it states:

1. Thrifty Shoppers did not submit its reply brief to the motions of the United States and of defendants below

prior to the Court's order affirming the judgment of the district court for the following reason:

On December 26, 1967, the undersigned, David B. Gold, counsel for Thrifty Shoppers, called the Clerk of this Court by telephone from San Francisco, California, to make inquiry of the time within which he must file a brief opposing any motions which might be filed by the United States and by defendants below to dismiss or affirm. The undersigned had been notified that the time within which the United States and defendant appellees would have to file motions had been extended by the Court to January 2, 1968. In this telephone conversation, the Clerk of the Court stated that the jurisdictional statements and the motions and reply briefs would not be distributed to the Justices prior to Tuesday, January 16, 1968. In reliance thereon, the undersigned proceeded with the preparation and printing of Thrifty Shoppers' brief opposing the motions to dismiss or affirm so that the brief would be filed with this Court on January 16, 1968.

2. The motion of the United States to affirm the judgment and the motion of the defendants below to dismiss the appeals of appellants or to affirm the order of the district court denying appellants' motion to intervene and to vacate the final judgment should be denied for the reasons:

a. The decree entered below will not dissipate the monopoly.

b. Blue Chip achieved monopoly power by a joint venture which the decree does not dissolve.

c. The trial judge failed to comply with minimal procedural due process in making economic determinations on disputed facts and in formulating provisions which he regarded essential to any consent decree to be entered by him. In doing so, he acted without the benefit of evidentiary

hearings, including testimony and the right of cross-examination.

d. Thrifty Shoppers has such an interest as to entitle it to intervene and its motion to intervene was timely.

The Decree Entered Below Will Not Dissipate the Monopoly.

Contrary to the assertions of appellees, the facts of record demonstrate that the decree entered by the district court is patently inadequate.* It will not bring an end to the unlawful combination entered into by large chain retailers in California nor will it dissipate the monopoly they have achieved in the trading stamp industry in that state through their joint venture in Blue Chip. Not only does the decree permit the retailer defendants (a) to retain more than 40 percent of the stock ownership of Blue Chip and (b) to continue to make use of Blue Chip stamps in their stores but it expands the existing monopoly by affording other retailers who have been using Blue Chip stamps the opportunity to acquire approximately 45 percent of the company's stock, thereby tying additional thousands of California merchants to Blue Chip.

The fact that this judgment was entered by consent does not constitute a basis for failing to award relief minimally requisite to redress the antitrust violation. In that connection, the views of the Department of Justice with respect to the standards which should be met by a consent decree have

*Defendant appellees contend that the framing of antitrust decrees is largely a matter for the discretion of the trial court (Def. Br. pp. 23-24). The fact is that this Court does not limit itself to a narrow review of the remedies fashioned below in antitrust cases. In *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 323 (1961), the Court "made it clear that a decree formulated by a District Court is not 'subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree.'"

been set forth by the Assistant Attorney General in charge of the Antitrust Division as follows:

> " * * * I believe the Government normally should resolutely refrain from settling for anything substantially less than what it believes it would be entitled to secure after an adjudication in its favor. To do otherwise would be to eradicate much of the enforcement gain that comes from the negotiation of consent decrees. For if the Government indicated a willingness to trade off significant decree provisions for relief from the burdens of litigation, virtually all decrees would quickly sink to a much lower level of effective relief."*

The situations in which the Assistant Attorney General considered that the Government should settle "for less than the full range of relief that litigation might conceivably secure" were stated to be those in which the Government has serious doubts about the legal theory of the case and those in which the gain from what is given up would not outweigh the cost and risk of full litigation and the case is not an important one. Neither situation is present here. Government counsel, in discussing this case with the court in the course of consent proceedings, said that "a very important crime has been committed here" (Tr. Dec. 13, 1966, p. 16); that "this is a boycott, an illegal monopoly. It is very hard to come in and fight with a company that has already got 80 percent of the business, that is owned by your best customers. If you want to do business with these supermarkets you have got to break the boycott, they own the monopoly, a monopoly in which there is no competition," (*id.* p. 30); and "[H]ere we have in existence a monopoly power illegally acquired. It is by every definition,

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*Address, Donald F. Turner, before The Association of the Bar of the City of New York, Dec. 13, 1967 (ATRR No. 336, Dec. 19, 1967, X 1,2).

by every case illegal. Your Honor must enjoin" (*id.* p. 69).* The lower court said that "[I]t appears that the case, without any question, is a case of unusual quality. The economic ramifications are probably greater within a narrower geographical aspect, however, than any like case that has been presented before * * * " (Tr. Dec. 15, 1966, p. 402, quoted in Def. Br. at p. 40a).

That any decree entered by the lower court would be inadequate became inevitable when in the course of argument by this *amicus curiae* prior to entry of the decree the trial judge reiterated the view that the grocery industry in California was more important than the trading stamp industry and that his efforts to preserve competition in trading stamps would not be at the risk of the grocery industry (Tr. June 5, 1967, pp. 46-47). In choosing to sacrifice competition in one industry to secure purported benefits in another, the trial court made a legislative decision which was "beyond the ordinary limits of judicial competence." *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963). The Government emphasized this precise point to the trial judge at hearings on the earlier consent decree filed on October 28, 1966, when in criticising a proposal of the State of California and others for settlement of the case Government counsel said:

> "[T]hey are saying that 'if there is an effect in the grocery market on competition because of dissipation of a monopoly in trading stamps, forget about a monopoly in the trading stamp business because the grocery business is more important.'

*These statements were made by Government counsel prior to the announcement by the trial judge, on December 15, 1966, of the provisions he considered should be included in any judgment entered by him (Tr. Dec. 15, 1966, pp. 404-408, quoted in Def. Br. at pp. 41a-44a). These provisions constituted the basis for the decree ultimately entered.

"First the answer to that, your Honor, the answer to all those cases is that that is a legislative decision. It is up to the legislature to say that competition in one industry is more important than another * * *." (Tr. Dec. 13, 1966, p. 47)

Blue Chip Achieved Monopoly Power by a Joint Venture Which the Decree Does Not Dissolve.

A fundamental error in the Government's position on appeal is its contention that Blue Chip "achieved monopoly power as a result of the restrictive conditions it imposed on its members which effectively precluded other trading stamp companies from entering the market" and that once those restrictions have been removed and retailers given "both access to Blue Chip stamps and the right to acquire stock in the company" then "the large share of the market embraced by the Blue Chip co-operative trading stamp program has a far less significant anticompetitive effect" (Gov't Br. pp. 13-14). The fact is that the monopoly position of Blue Chip was the direct product of an unlawful joint venture engaged in by the creation and operation of Blue Chip by eight of the largest retail grocery chains in California (which in 1963 were doing more than $1,800,000,000 business) (R. 847) and the largest chain of retail pharmacies in the state. So long as the structure of Blue Chip remains such that the leading retail grocery chains in California are permitted to own its stock and to issue its stamps, there can be no dissipation of the monopoly. "Dissolution of the combination will be ordered where the creation of the combination is itself the violation." *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944). Accordingly, "in this type of case [the Court] start[s] from the premise that an injunction against future violations is not adequate to protect the public interest." *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948).

In *Associated Press v. United States*, 326 U.S. 1 (1945) and in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), cited by the Government (Gov't Br. p. 15), specific practices of the defendants were attacked, and the Court did not consider dissolution of those organizations. In the instant case, on the contrary, the thrust of the complaint was directed at the conspiracy by which Blue Chip was organized and operated by eight defendant supermarket chains doing approximately 51 percent of all chain grocery sales in the Los Angeles area and approximately 37 percent of such sales in California and by the largest chain of [illegible]macies in California (R. 4). The relief sought by the Government's complaint included the prayer that each of the defendant retailers be required to divest itself of all of its stock in Blue Chip and that each of such defendants be required to cease issuing Blue Chip stamps to its customers. Thrifty Shoppers does not seek the dissolution or dismemberment of Blue Chip, as the Government states in its brief (Gov't Br. p. 13). The relief Thrifty Shoppers seeks is that which the Government sought in its complaint and the only remedy that can be effective: the divorce of Blue Chip from the retailer defendants so that Thrifty Shoppers and other trading stamp companies will have a realistic opportunity to compete.

There Is No Basis for the Distinction Drawn Below Between Franchised and Non-Franchised Stamp Companies.

Appellees place great reliance upon the insistence of the lower court that the viability of Blue Chip be insured because that company makes available its trading stamps on a non-franchised basis. There is no legal or economic justifica-

tion for differentiating between "franchised" stamps and "non-franchised" stamps. The Government made no such distinction, alleging in its complaint that the defendants have conspired to restrain trade and commerce in "the trading stamp business" and have monopolized "the trading stamp business", not "the *non-franchised* trading stamp business." Defendant appellees have recognized in their brief that there is no such distinction between franchised and non-franchised companies in asserting that *all* trading stamp companies will "have every incentive and opportunity to compete for Blue Chip's patrons" (Def. Br. p. 14).

There is no factual basis in the record for the concern expressed by the lower court for the non-franchised Blue Chip trading stamp. If some retail merchants in California desire a non-franchised trading stamp, there is no reason to doubt that some company will provide that service to them. If other retailers want a franchised trading stamp, still other companies will provide that kind of service. The appropriate place for the decision to be made as to what trading stamps California retailers issue and what stamps California housewives save is in the market place.

The Possibility That One-Third of Blue Chip's Business May Be Sold Will Not Dissipate the Monopoly.

In the face of the continuing tie of defendant retailers and other stamp users to Blue Chip, appellees urge that reliance be placed on Sec. IX of the final judgment which provides that within 30 months after completion of Blue Chip's reorganization (and at this time that reorganization has not been accomplished) the company shall present a plan to the

court for the sale of one-third of Blue Chip's then existing trading stamp business in California, all such business to be located within a contiguous geographic area within Southern California. Even if this business should be sold—and that there will be a sale is far from certain—the reduction in Blue Chip's size would be concentrated in a single geographic area, and there would be absolutely no reduction in Blue Chip's volume of business in the balance of the territory in which Blue Chip operates: all of Northern California* and that part of Southern California in which none of Blue Chip's business will be sold and in which Blue Chip does approximately one-third of its total business. It should further be noted that under the decree Blue Chip would merely be required to submit a *plan* under which it would *offer* to sell one-third of its business. An overwhelming number of the customers "purchased" from Blue Chip would be Blue Chip's stockholder-customers, who would be neither obligated nor inclined to do business with the purchaser. Those that did would be unlikely to continue as customers of the purchaser for more than a year, after which they would be free under the decree to return to Blue Chip. As the trial judge candidly stated: "It is entirely possible that nobody would ever buy under those terms and conditions . . . " (Tr. Dec. 15, 1966, p. 407, quoted in Def. Br. App. D p. 43a).

Defendant appellees seek to establish that in fact a sale will be made by quoting *in extenso* a colloquy between the

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*In Purity Stores, Inc., v. Blue Chip Stamp Company, 1963 Trade Cas. ¶ 70,895 (N.D. Cal. 1963), the court found that Blue Chip was the dominant trading stamp company in Northern California, "having in excess of 75% of the trading stamp business." (Finding of Fact No. 7).

trial judge and Mr. Spivack, Government counsel (Def. Br. pp. 14-16). Mr. Spivack informed the court, on questioning, that the Department of Justice had made no study to determine if it were realistic to believe that one-third of Blue Chip's business could be sold in the light of the extremely difficult competitive conditions the purchaser would face, particularly one year after the sale when Blue Chip would re-enter the market in which the sale would be made. Mr. Spivack went on to say that Gold Bond wanted to buy this business and if that were so "probably somebody else will be willing to buy it."

The foregoing exchange exemplifies the basis upon which the trial judge reached his determination as to the provisions which should be incorporated into the decree in this large and important case and the judge's economic conclusions underlying such provisions—such as his belief that it was necessary to include provisions to protect the retail grocery business and to preserve the non-franchised stamp business. There were no evidentiary hearings, no testimony of witnesses and no opportunity to cross-examine the trial judge's economic conclusions on which the decree was based, though the participants were sharply at variance as to the validity of those economic conclusions.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967), this Court held that "the 'existing parties' have fallen far short of representing its [Cascade's] interest," although in the relief proceedings hearings had been held in which the proposed divestiture plan was supported by testimony. Under *Cascade*, the deficiencies present in this case *a fortiori* entitle appellant to intervene as of right.* When, as here, the trial judge has formulated provi-

*In *Cascade*, the Government, though opposing intervention, said that "[t]he decree in this case is not technically a consent judgment; but it shares important characteristics with one. Frequently, after

sions which he regards as essential to any consent decree he will enter, minimal procedural due process requires that the disputed economic facts underlying those provisions should be the subject of evidentiary hearings which would include the right of cross-examination of such facts.

Thrifty Shoppers Has Such an "Interest" as to Entitle It to Intervene.

Both the defendants and the Government argue, on the one hand, that Thrifty Shoppers has no "interest" in the subject matter of the action and, on the other hand, that it may adequately protect said interest because it has instituted a private treble damage action based on the charges in the complaint herein.

There can be no real question that Thrifty Shoppers has a substantial interest in the outcome of this suit. As a competitor, its very survival may depend upon the terms of the decree entered herein. The complaint of the Government alleged that "[T]rading stamp companies which have competed with or which desire to compete with Blue Chip in the trading stamp business in California have been denied the opportunity to do so in a competitive market" (R. 13-14).

A holding that a competitor should be barred from intervening because it has the right to commence a private action based on the same violation of law would prevent any competitor from ever intervening in an antitrust action. Such a conclusion would be utterly inconsistent with *Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra,* in which Cascade, a distributor of natural gas in Oregon and Wash-

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the issue of violation has been litigated and determined, the parties in a government antitrust proceeding will, as here, negotiate a decree, which is then entered by stipulation" (Gov't Br. filed Dec. 29, 1966, p. 34). This Court sustained the appeals of the parties seeking intervention, holding that they were entitled to intervene as of right and requiring *de novo* hearings on divestiture.

ington, was permitted to intervene even though it presumably could have maintained a private action for damages as well as for injunctive relief as a result of the unlawful merger.

This Court has had frequent occasion to express its insistence upon preservation of the rights of the private treble damage plaintiff, e.g., *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965) in which the Court pointed out that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Certainly, unless this decree is set aside, this appellant cannot expect to secure more adequate relief in its private case than the Government has secured, particularly in the same district court. Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 694.

Private treble damage actions, an important adjunct to the enforcement of the antitrust laws, will suffer serious impairment as a means of redressing antitrust violations if those situated such as is this appellant are denied the right to intervene to secure adequate relief in Government actions. Moreover, this conclusion is in all respects consonant with the amended Rule 24(a); unless appellant is permitted to intervene "the disposition of the action may as a practical matter impair his ability to protect" his interest in the action.

Thrifty Shoppers' Motion to Intervene Was Timely.

The fact that Thrifty Shoppers did not formally move for intervention until after entry of the judgment below should not impair its right to intervene. The position the Government appears to be taking is that, had Thrifty Shoppers formally moved for intervention, rather than

for permission to file a brief *amicus curiae,* its application would have been timely. Since Thrifty Shoppers was, as the district court noted in its opinion and as the defendant and Government appellees have emphasized in their briefs, "given every opportunity to be heard" the only purpose of a prior intervention would have been to preserve its right to appeal. This right would have been academic had the arguments made by Thrifty Shoppers and other *amici* been successful. Intervention here accords with the orderly administration of justice. Appellant's motion to intervene dealt with a real, and not merely theoretical, purpose; it was made to set aside an inadequate decree and, failing that, to appeal to this Court. An application for intervention by Thrifty Shoppers would undoubtedly have been met with the response by the Government and a decision by the court that, since Thrifty Shoppers was being permitted to present its views *amicus curiae,* such application was at that time premature.

CONCLUSION

For the reasons stated, this petition for rehearing should be granted. The order affirming the judgment of the district court should be set aside and probable jurisdiction should be noted.

Respectfully submitted,

DAVID B. GOLD
Counsel for Appellant
Thrifty Shoppers Scrip Co.

January, 1968

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing of the order of this Court affirming the judgment of the district court is presented in good faith and not for delay.

DAVID B. GOLD

Counsel for Petitioner